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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY
And
VERTAC CHEMICAL CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY OF PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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Appellee's, United States', Petition for Rehearing and Suggestion of Rehearing *In* [sic] *Banc* and Addendum A thereto, *FMC Corp. v. United States Dept. of Commerce, 29 F.3d 833 (3rd Cir. 1994) (en banc)* 3

ARGUMENT

The United States' Standing Argument Is Without Merit

The United States agrees with Petitioners that the courts below had a duty to determine whether they had jurisdiction to decide the CERCLA[1] claims against the United States before proceeding to the merits. (Br. at 17). The United States also agrees that the courts below failed to perform this duty. *Id.* Furthermore, the United States agrees that if this Court grants certiorari in this case, the "sovereign immunity issue would present a necessary and preliminary inquiry. . . ." *Id.* Notwithstanding these concessions, however, the United States apparently argues that Petitioners somehow lack standing to raise this issue. *Id.* This argument is without merit.

The United States cites *California v. Rooney*, 483 U.S. 307, 311-14 (1987), for the proposition that Petitioners may not seek further review of the jurisdictional issue. This case, however, is inapposite because it did not involve any jurisdictional issue. Jurisdictional issues can be raised by any party at any time, even if they were never raised in earlier stages of the litigation. All federal courts, including the Supreme Court, have a duty *sua sponte* to determine as a threshold question whether they and the lower courts have jurisdiction over the merits of claims, even if no party challenges the courts' jurisdiction. *See, e.g., Carden v. Arkoma Assocs.*, 494 U.S. 185, 196 (1990); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990); *Allen v. Wright*, 468 U.S. 737, 750 (1984). Thus, the Supreme Court would be required to address this jurisdictional issue even if Petitioners had not raised it.

The United States contends that Petitioners lack standing because they "effectively prevailed" on the merits of the sover-

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[1] "CERCLA" is the acronym for the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq.*

eign immunity issue. (Br. at 17). This argument is simply wrong. As the United States is fully aware, the courts below never decided the sovereign immunity jurisdictional issue. Instead, the Eighth Circuit expressly stated that its decision on the merits in favor of the United States obviated the need to decide this issue. *See United States of America v. Vertac Chem. Corp.*, 46 F.3d 803, 811 n.10 (8th Cir. 1995); Petitioners' Brief, App. A-15 n.10. There is no reason to believe that the courts below would have held that there was a sovereign immunity waiver if they had decided this jurisdictional issue. And there are significant differences for Petitioners between a dismissal on jurisdictional grounds and a loss on the merits:

> The collateral ramifications of a decision on the merits are clearly different from those that attend a dismissal on jurisdictional grounds. Res judicata, for example, will only attach to a decision on the merits. Private agreements among the parties or between the parties and their attorneys or indemnitors may also be affected by the form of the court's decision.

Clow v. United States Dept. of Housing and Urban Dev., 948 F.2d 614, 627 n.4 (9th Cir. 1981) (*per curiam*). Consequently, Petitioners had, and continue to have, a very great interest in having this jurisdictional issue decided first.

Furthermore, the United States argues that there is no "conflict among the courts of appeals [sic] on this issue. . . ." (Br. at 16). This argument is also incorrect. The United States Court of Appeals for the Third Circuit, in a case involving the same or similar issues, correctly addressed the sovereign immunity issue first, and only addressed the merits of the CERCLA claims against the United States after determining that there was a waiver of sovereign immunity. *FMC Corp. v. United States Dept. of Commerce,* 29 F.3d 833, 838-42 (3rd Cir. 1994) (*en banc*). There is at least a conflict in principle between the Third Circuit's correct approach to this issue and the Eighth Circuit's

mistaken belief that it need not address the threshold sovereign immunity issue at all. According to the United States, there are some twenty-four (24) other pending cases which present the same, or similar, issues of government CERCLA liability.[2] Given the likelihood of further inconsistent interpretations by the federal courts, this Court should instruct the lower courts that they are to adopt the Third Circuit's correct approach to this issue, and not follow the Eighth Circuit's avoidance of it.

This jurisdictional issue manifestly transcends CERCLA. The Eighth Circuit's holding in this CERCLA case is precedent for ignoring jurisdictional issues in any type of proceeding. For example, the United States Court of Appeals for the Ninth Circuit has consistently held in non-CERCLA cases that it can ignore sovereign immunity and other jurisdictional issues if it decides claims on the merits in favor of the defendants. *E.g., Clow*, 948 F.2d at 616 n.2. The United States Court of Appeals for the D.C. Circuit has reached similar holdings. *E.g., Cross-Sound Ferry Servs., Inc. v. I.C.C.*, 934 F.2d 327, 333 (D.C. Cir. 1991). Both Courts of Appeals believe that their decisions are justified on the basis of the so-called "hypothetical jurisdiction" doctrine. The decisions in both Courts of Appeals are subject to scathing dissents, including then Circuit Judge Clarence Thomas's dissenting opinion in *Cross-Sound Ferry Servs.*, 943 F.2d at 335-46, which explained clearly that there is no constitutional basis for courts assuming jurisdiction and ruling on the substantive merits. *Accord Clow*, 948 F.2d at 619, 625-28 (O'Scannlain, C.J., dissenting) (relying in large part on Justice Thomas's dissent in *Cross-Sound Ferry Servs.*).

Absent holdings to the contrary by this Court or the Courts of Appeals sitting *en banc*, however, there is no authority to overrule the decisions of these courts. The decisions thus re-

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[2] Appellee's, United States', Petition for Rehearing and Suggestion of Rehearing *In* [sic] *Banc* at 14 and n.6, and Addendum A thereto at 20, *FMC Corp. v. United States Dept. of Commerce*, 29 F.3d 833 (3rd Cir. 1994) *(en banc)*.

main binding precedent on the scope of those courts' jurisdiction. *See, e.g., Koff v. United States*, 3 F.3d 1297, 1299 (9th Cir. 1993). This Petition presents the Supreme Court with a vehicle for, *inter alia*, providing unequivocal guidance to the federal courts on one of the most fundamental principles of federal jurisprudence: A federal court must always address its subject matter jurisdiction first; if there is no jurisdiction, then the claims must be dismissed. This fundamental principle is now being ignored in at least three different Courts of Appeals.

The United States' New Jurisdictional Argument On Hercules's DPA Claims Requires Supreme Court Review

Ironically, the United States now argues that the Defense Production Act ("DPA")[3] indemnification issues raised by Hercules in its Petition For A Writ Of Certiorari (No. 94-1557) should not be reviewed by this Court because the courts below lacked jurisdiction to decide them. (Br. at 18-20). However, the United States never made this jurisdictional argument below. Instead, the United States — without objecting to the District Court's jurisdiction and after successfully seeking affirmation of the lower court's decision on the merits in the Court of Appeals — only argued against Hercules's DPA claims on the merits.

This new argument ignores the actual holdings below.[4] The courts below only addressed Hercules's DPA claims on the merits, and only held against Hercules on the merits. If the courts below lacked jurisdiction over these DPA claims, then their decisions on the merits of those claims must also be vacated by this Court. Otherwise the Eighth Circuit's decision on the merits will be res judicata on claims which the courts lacked jurisdiction to decide.

[3] 50 U.S.C. app. §§ 2061 *et seq.*

[4] Moreover, Petiioners note that the United States' indemnification argument is, in part, confusing and incomprehensible. *See, e.g.*, Br. at 18.

The Supreme Court has already granted certiorari on Hercules's related DPA indemnification claims in the United States Court of Appeals for the Federal Circuit (No. 94-818). The United States suggests that this Court should deny review of Hercules's DPA indemnification claims in the Eighth Circuit because the Court's decision on the Federal Circuit claims may "shed light" on the Eighth Circuit claims. That "light" may be extinguished if the Court follows the United States' suggestion. The Eighth Circuit's decision on the merits of Hercules's DPA claims will be res judicata if this Court denies Hercules's Petition For A Writ Of Certiorari in No. 94-1557, regardless of the Court's subsequent decision on the Federal Circuit claims in No. 94-818.

CONCLUSION

Both the Eighth Circuit and Federal Circuit Petitions contain overlapping DPA indemnification issues. These DPA issues also affect the merits of the CERCLA claims against the United States, which rely heavily on the United States' actions and authority under the DPA. Accordingly, the Eighth Circuit Petitions should be granted certiorari and consolidated with the related Federal Circuit opinion which has already been granted certiorari in No. 94-818. In the alternative, the Court should vacate the Eighth Circuit's decision on all issues and remand with instructions to the lower courts to determine whether they have jurisdiction over both the CERCLA claims and the DPA indemnification claims against the United States. At the very least, the Court should stay action on all petitions for review of the Eighth Circuit's opinion pending the Court's decision on the Federal Circuit DPA indemnification claims in No. 94-818.

Whatever the thrust of the United States' contention, Petioners fail to understand how a "claim for indemnity by the United States . . . could constitute one of the 'claims against the United States' . . . ." *Id.*

Respectfully submitted,

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